

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WADE HINDS,

Defendant-Appellant.

UNPUBLISHED

August 31, 1999

No. 207252

Montcalm Circuit Court

LC No. 97-000101 FH

Before: Markman P.J., and Saad and P. D. Houk*, JJ.

MEMORANDUM.

Defendant appeals as of right from his conviction of criminal sexual conduct in the third degree, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After the trial was completed a juror, Jean Andresen, contacted the prosecutor and indicated that she was acquainted with Tabatha Duran, one of the complainants. Defendant moved for a new trial, arguing that Andresen's presence on the jury deprived him of his right to a fair and impartial trial. He contended that because he would have exercised a peremptory challenge to remove Andresen had her acquaintance with Duran been revealed, he was entitled to relief. *People v Graham*, 84 Mich App 663, 666-668; 270 NW2d 673 (1978). At an evidentiary hearing Andresen testified that that she had informed only one other juror of her acquaintance with Duran, and that the subject had not surfaced during deliberations. Andresen observed that if anything, her acquaintance with Duran raised negative feelings toward Duran rather than toward defendant. She opined that the jury had followed the court's instructions in reaching its verdict. Patricia Larsen, the juror who learned of Andresen's acquaintance with Duran, opined that the information had had no effect on the jury's deliberations in general or on her deliberations in particular. The trial court denied defendant's motion for a new trial, finding that Andresen's acquaintance with Duran had not affected the jury's deliberations, and that defendant had not been deprived of his right to a fair and impartial trial.

* Circuit judge, sitting on the Court of Appeals by assignment.

We review a trial court's decision on a motion for new trial based on juror misconduct for an abuse of discretion. A new trial will not be granted if no substantial harm was done to the defendant. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

Defendant argues that the trial court abused its discretion by denying his motion for a new trial. We disagree and affirm. When information that had the potential to affect a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish that he was actually prejudiced by the juror's presence, or that the juror was excusable for cause. Simply asserting that a juror would have been excused via a peremptory challenge had the information become known is insufficient. *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998). Here, defendant does not assert that Andresen would have been excusable for cause. Moreover, defendant has not established that he was actually prejudiced by Andresen's presence on the jury. Andresen opined that her acquaintance with Duran produced negative feelings, and that the jury followed the instructions given to it in reaching its verdict. No abuse of discretion occurred. *Messenger, supra*.

Affirmed.

/s/ Stephen J. Markman

/s/ Henry William Saad

/s/ Peter D. Houk